IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 73 OF 2003

Estaquio L. A. Misquitta
R/o H. No.161-A,
Demello Waddo,
Acoi, Karaswaddo, Mapuca. ... Appellant

versus

State of Goa,
As represented by
Officer-In-Charge,
Mapuca Police Station,
Mapuca, Goa. ... Respondent

Mr. S. D. Lotlikar, Senior Advocate with Ms. S. Naik, Advocate for the Appellant.

Mr. S. N. Sardessai, Public Prosecutor for the State.

CORAM : N. A. BRITTO, J.

DATE : 13TH AUGUST, 2004.

ORAL JUDGMENT

This Appeal is directed against Judgment and Order dated 18/27th November, 2003 of the learned Ist Additional Sessions Judge, Panaji, in Sessions Case No.33/99 by which the Appellant who was an Accused in the said case has been convicted and sentenced under Section 307 of the Indian Penal Code and under Section 27 of the Arms Act, 1959.

2. The Accused is a Superintendent of Customs and Central Excise and was not only a next door neighbour but also a relative of the wife of P.W.1, Minoo Bharucha, whose death the Accused is alleged to have attempted to commit.

3. There is also no dispute that there was some enemity between them on account of a property dispute between the mother-in-law of P.W.1, Bharucha and the Accused.

4. The case of the prosecution was that on 28th October, 1996, at about 20.30 hours, the Accused threatened the said P.W.1, Bharucha, with dire consequences and after making preparation to kill him fired three live rounds from his pistol and thereby attempted to kill him.

5. The Accused did not deny the firing incident and not only that the Accused admitted having filed a missing report of his pistol but stated that after he returned home, he had searched and found the pistol on the refrigerator, and had fired two shots in the air to check whether it was in working condition and he had planned to inform the Police upon the finding of the pistol on the next morning but some time later in the night, a constable came to his residence and asked him to come to the Police Station and, therefore, he willingly went taking with him his pistol and two empty cartridges and his licence which he handed over to the said

P.S.I. Sawant who placed him under arrest. The Accused denied that he had fired any shot at the said Complainant – Bharucha. The Accused had also denied that any person came to his house that night to question him about the firing. The Accused had also denied that he had abused or threatened the mother-in-law of P.W.1, Bharucha, by name Teodolinda D'Souza, P.W.4, at any time on that day and further had stated that he was in the house till about 6 p.m. The accused also denied that P.S.I. Sawant had come to his residence on that night and that the letter about the finding of the pistol was written by him upon the forced dictation of the said P.S.I. Sawant. The Accused also stated that he had undergone training at the G.R.P. at Altinho, Panaji, for firing of arms including pistols as part of his training which he had to undergo as an Executive Officer of the Customs and Central Excise Department. The Accused had also examined, to support the latter part of his statement, D.W.1, Pritidas Vishnu Prabhudessai, a Deputy Commissioner of Customs and Central Excise and another Superintendent of Customs and Central Excise namely D.W.2, Deelip G. Ghodge, who, inter alia, had stated that they were taught during the training period that they should use the revolver with both their hands so that it does not shake or jump.

6. The Accused having been charged under Section 307 of the Indian Penal Code and under Section 27 of the Arms

Act, 1959, the prosecution examined thirteen witnesses to support the charge including the Investigating Officer, P.S.I. Sunita Sawant.

7. As far as the main incident of shooting goes, the same remains only on the evidence of P.W.1, Bharucha. As far as the other story of the prosecution goes, the prosecution examined P.W.4, Teodolinda, the mother-in-law of the Accused and P.W.6, Agnes Bharucha, the wife of the Accused who had also heard the pistol shots fired by the Accused. However, it must be noted that P.W.4, Teodolinda, was partly discredited in her version when she stated in her evidence before the Court that P.W.1, Bharucha, had told her that the Accused had fired at him when he was climbing the steps, she having not made such statement when her statement was recorded by the Police. After the firing incident, P.W.1, Bharucha, is stated to have met some boys and regarding this incident, the prosecution had examined P.W.5, Vitorino D'Souza and P.W.10, Ramesh Mapsekar, who are stated to have returned along with P.W.1, Bharucha, and questioned the Accused as regards the incident. Even at this stage, it is otherwise admitted by P.W.1, Bharucha, that the Accused told them that he had not fired at him(P.W.1, Bharucha) but in the air. As far as P.W.5, Vitorino, is concerned, he stated that by the time they reached the house of P.W.1, Bharucha, everything was over. P.W.5, Vitorino, was found drunk when he was examined before the learned Ist Additional

Sessions Judge, Panaji, and not only that he had even admitted that he required a drink in the morning. Permission to cross-examine him was refused by the learned Ist Additional Sessions Judge, Panaji. In fact, one fails to understand as to how the learned Ist Additional Sessions Judge, Panaji, allowed P.W.5, Vitorino to be examined in that condition. The trial Courts are certainly not spectators just to watch as to what goes on before them without taking appropriate action in accordance with law as and when required. P.W.10, Ramesh, on the other hand, had stated that P.W.1, Bharucha, had told them that he had already fired three bullets and seeing so he had gone inside. Admittedly, P.W.5, Vitorino and P.W.10, Ramesh, when the incident of firing took place were at a distance of about 900 to 1000 metres though that distance might have been shorter by a short cut. If, P.W.1, Bharucha, had stated that some boys near the Bar Mario Biet had stopped him and asked him about the sound, the said version was admittedly not corroborated by P.W.5, Vitorino, though it was supported to some extent by P.W.10, Ramesh. The evidence of P.W.4, Teodolinda, P.W.5, Vitorino, P.W.6, Agnes and P.W.10, Ramesh has been taken to be corroborative evidence by the learned Ist Additional Sessions Judge, Panaji. It might have been corroborative to some extent as far as the subsequent events were concerned but it was certainly not corroborated as far as the main incident of shooting was concerned which was otherwise admitted by the

Accused, having taken a plea that he had fired, but had not fired at P.W.1, Bharucha, but in the air to test his pistol.

8. Section 307 of the Indian Penal Code provides that whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.

9. Admittedly, intention or knowledge being a state of mind can be gathered by way of inferences to be drawn from the facts and circumstances of the given case.

10. There is no doubt that the Accused did file a false missing report at about 8 p.m. on the same day with P.W.12, Subhash Goltekar, that his pistol was missing but as rightly pointed out by the learned Ist Additional Sessions Judge, Panaji, the said filing of a missing report only created a suspicion against the Accused.

11. P.W.1, Bharucha, lodged his complaint which was registered at about 21.35 hours and which complaint was produced at Exh.PW1/A. It is interesting to note that in

the said complaint, P.W.1, Bharucha, did not even mention that the Accused had fired in his direction to murder him or cause his death. All that P.W.1, Bharucha, stated was that the Accused fired three shots in his direction. Therefore, it would be necessary to find out whether the Accused had fired at P.W.1, Bharucha, with the intention or knowledge to kill him.

12. As stated by the Supreme Court in the case of **Hari Kishan** v. **State of Haryana**(AIR 1988 SC 2127) under Section 307 of the Indian Penal Code what the Court has to see is whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that Section. The intention or knowledge of the Accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of "attempt to murder". Under Section 307 of the Indian Penal Code the intention precedes the act attributed to Accused. Therefore, the intention is to be gathered from all circumstances and not merely from the consequences that ensue.

13. Admittedly, no injury was caused to the Accused in this case but the Accused claims that the bullets were fired by the Accused not only towards his direction but P.W.1, Bharucha also stated that the said bullets whizzed passed

over his head. It is this aspect which requires little more closer examination.

14. P.W.1, Bharucha, stated that he returned home and parked his bike on the road and upon entering the gate, he heard a bullet passing over his head and then he looked in the direction from where the sound came and he saw the Accused standing in the veranda of his house with a gun pointing in his direction. He stated that the distance from the place where the Accused was and he was about 15 to 18 metres and by seeing him he ducked in the cover of bushes and then tried to move again and then he heard the second bullet running over his head and then he went to the gate in order to go and at that time, he heard a third bullet. He stated that all the three bullets were directed towards him and thereafter, he retreated from the main gate and went to the side gate and entered his house and told his wife and mother about the incident and then informed them that he was proceeding to Mapusa to file the complaint.

15. P.W.1, Bharucha, has repeatedly stated in his evidence that he heard a bullet passing over his head and thereby P.W.1, Bharucha, probably wanted to convey that he felt the bullet as it whizzed above his head. In fact, he was asked in cross-examination as to how he knew that the bullet was passing over his head and he replied by stating that as soon as he heard the sound of firing he looked up

towards the house of the Accused and the Accused was standing in the balcony with a gun pointing towards him and that is the reason why he stated that he heard the bullet passing over his head. He stated that the bullet did not touch his head.

16. Admittedly, there is no corroboration whatsoever to the statement of P.W.1, Bharucha, that the Accused had directed all the three shots towards him. In case, the Accused had shot the pistol in the direction of P.W.1, Bharucha, then the missile or projectile must have certainly hit the pillars of the gate or the wall. The prosecution chose not to observe these facts in order to confirm as to what P.W.1, Bharucha had stated was correct or not. The fact that the empty cartridges were found in the veranda or there about of the Accused does not corroborate the version of P.W.1, Bharucha, that the Accused fired the shots in his direction. It only proves that the Accused only fired his pistol. Obviously, P.W.1, Bharucha, could not have certainly felt the whizzing of the bullet over his head since he himself was at a distance of about 15 to 18 metres. He could not have seen also the bullet pass over his head. This appears to be his imagination. The version of P.W.1, Bharucha, that he had seen the Accused with a pistol only in the right hand of the Accused stretched at his shoulder height also appears to be improbable in case the Accused wanted really to hit P.W.1, Bharucha and murder him since it

is in defence evidence that the Accused was trained to hold the pistol in both the hands so that the pistol does not shake. It is otherwise also common knowledge that if one wants to shoot with a pistol it must be held firmly with both the hands so that the aim is not missed. It is common knowledge that it is easier to kill a person from a distance by a gun than by a pistol. P.W.1, Bharucha, further stated that when he came back, the Accused came in a drunken condition. This statement of P.W.1, Bharucha, who was not at all corroborated by either P.W.5, Vitorino or for that matter, P.W.10, Ramesh or even by P.W.13, P.S.I. Sawant, who arrested the Accused soon thereafter. P.W.1, Bharucha further stated that when he asked the Accused as to why he had done that, the Accused replied that he had not fired at him but in the air. Here also, it appears that in case, P.W.1, Bharucha, was aware that the Accused had shot at him to kill him, then firstly P.W.1, Bharucha would not have taken risk and crossed the gate of the Accused to proceed to the Police Station and again would not have gone to the house of the Accused to question him. The conduct of P.W.1, Bharucha, does show that the Accused did not intend to murder P.W.1, Bharucha, and if that was so and the Accused was in that mood, the Accused would have again shot at P.W.1, Bharucha, either when the latter passed in front of his house to go to the Police Station or again when P.W.1, Bharucha came to his house. The conduct of the Accused at the relevant time does not appear to be of a man who was

bent upon to shoot him. It is true that the Accused took a plea that he had fired in the air to test his pistol but it cannot be ruled out that the Accused might have fired in order to put some fear in P.W.1, Bharucha.

17. P.W.1, Bharucha, further stated that after he filed the complaint, the Police came at the site and searched the place and found three cartridges which he saw after the Police called him there. However, this part of the story is again not corroborated by P.W.13, P.S.I. Sawant who stated that P.W.1, Bharucha, was not present in the house of the Accused when she visited his house. Admittedly, all that P.W.13, P.S.I. Sawant did on that night was to post a constable at the scene. She drew the panchanama of the scene of the offence on the next day when the said three empty cartridges were found. P.W.1, Bharucha, further stated that he could not see the cartridges properly. Admittedly, the said cartridges were near about the veranda of the house of the Accused and if, P.W.1, Bharucha from the gate of his own house could see the Accused pointing out the pistol to him with the help of a bulb and tube light which he claims were there in the veranda of the house of the Accused and in the veranda of his own house, I fail to understand as to how P.W.1, Bharucha could not have seen the said cartridges in that light. In case there was darkness there, which fact is admitted by P.W.13, Sunita also, it is certainly probable

that P.W.1, Bharucha could not have seen the Accused pointing the pistol towards him and on that count also the version of P.W.1, Bharucha could not have been accepted without corroboration in material particulars. P.W.1, Bharucha, identified the pistol which according to him was shown to him by P.W.13, P.S.I. Sawant. As already stated, P.W.13, P.S.I. Sawant has confirmed that P.W.1, Bharucha had not come to the house of the Accused in the night when she had gone there. Moreover, P.W.1, Bharucha, also stated that after the third shot was fired then he moved out of the gate and closed the latch of the gate. The fact of closing the latch of the gate appears to be an unnatural conduct on the part of P.W.1, Bharucha, in case he had at all perceived that the Accused had fired at him to kill him. P.W.1, Bharucha, has stated that right from the time the Police came to the place of incident and till they left, the Accused was present during search operations which was done past midnight. On this aspect also, P.W.1, Bharucha was not at all supported by P.W.13, P.S.I. Sawant. It is also to be noted that P.W.1, Bharucha, had written down the complaint by himself and presented it at the Police Station.

18. The learned Ist Additional Sessions Judge, Panaji, also convicted and sentenced the Accused under Section 27 of the Arms Act, 1959. Admittedly, the Accused had a licence for the pistol. Probably, it was his service pistol. The evidence led by the prosecution did not show what condition

of the said licence the Accused had contravened and being so, the conviction and sentence of the Accused under Section 27 of the Arms Act, 1959 on a plea that the Accused had used it for unlawful purpose could not be justified.

19. A controversy was also raised regarding the manipulation of the F.I.R. which I do not propose to go into because of the view I have taken of the evidence of P.W.1, Bharucha.

20. The case at hand, was a case where admittedly, there was enemity between both the families namely P.W.1, Bharucha and the Accused, though they were related. Enemity is always a double edged weapon. Being so, it was incumbent upon the learned Ist Additional Sessions Judge, Panaji, to have scrutinised the evidence of P.W.1, Bharucha, closely which has not been done. The case of the prosecution rested on a very thin thread when considered in the light of the plea taken by the Accused that he did fire the pistol but not at P.W.1, Bharucha. The version of P.W.1, Bharucha that the Accused had fired in his direction or for that matter pointing out towards him was not free from doubt. As already stated, it is quite probable that the Accused might have also fired in order to scare P.W.1, Bharucha because of the property differences which his mother-in-law had with the Accused. The prosecution had failed to prove beyond reasonable doubt that the Accused had shot with the intent

or knowledge to cause the death of P.W.1, Bharucha. There has not been proof of circumstances which necessarily lead to the inference that the Accused had shot at P.W.1, Bharucha with the intention or knowledge of causing his death or to put it in the time honoured way, the incriminating facts were not incompatible with the innocence of the Accused and incapable of explanation on any other hypothesis. Being so, the Accused ought to have been given the benefit of doubt by the learned Ist Additional Sessions Judge, Panaji.

21. As a result, I hereby allow the Appeal and set aside the conviction and sentence imposed against the Accused under Section 307 of the Indian Penal Code and under Section 27 of the Arms Act, 1959. Consequently, the Accused shall now stand acquitted for the said offence.

N. . BRITTO,J.

RD.